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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 45

COMMONWEALTH OF PENNSYLVANIA, EX REL. STEPHEN J. HERMAN, PETITIONER

vs.

DR. JOHN W. CLAUDY, WARDEN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA, WESTERN DISTRICT

BRIEF OF PETITIONER

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BRIEF OF PETITIONER

Opinions Below

The opinion of the Court of Common Pleas of Washington County, Pennsylvania, which appears in the Transcript of Record at pages 18 to 22,[1] was not reported. The opinion of the Superior Court of the Commonwealth of Pennsylvania (Tr. 23-27) is reported at 176 Pa. Super. 387 (1954),

[1] Pages in the Transcript of Record are hereinafter referred to as (Tr. —).

107 A. 2d 595. The Supreme Court of Pennsylvania did not deliver any opinion.

Jurisdiction

Jurisdiction rests on 28 U.S.C. Sec. 1257(3) and 2254. The order sought to be reviewed—a denial by the Supreme Court of Pennsylvania of a petition for leave to appeal from the judgment of the Superior Court of Pennsylvania—was dated and entered October 6, 1954. Petition for certiorari was filed in this Court on January 3, 1955. Certiorari was granted on April 11, 1955 (348 U.S. 964).

Constitutional Provision Involved

United States Constitution, Article XIV, Section 1: "... nor shall any State deprive any person of liberty ... without due process of law."

Questions Presented for Review

(i) Whether a writ of habeas corpus may be denied consistently with the Fourteenth Amendment to the U.S. Constitution in a case in which a defendant has been sentenced to a state penitentiary following the entry of a plea of guilty when defendant confessed to the charges on which he was sentenced only after having been held incommunicado for a period of 72 hours, during which period defendant was questioned intermittently and subjected to threats (both to himself and to his family), physical abuse and mistreatment.

(ii) Whether a writ of habeas corpus may be denied consistently with the Fourteenth Amendment to the U.S. Constitution when defendant signed Waivers of Grand Jury proceedings and Pleas to 8 indictments containing 27 separate counts, carrying a maximum sentence of 315 years, and (1) defendant was refused information as to the indictments; (2) he was not advised of his right to

counsel; (3) he had no knowledge of his right to have court-appointed counsel; and (4) the number and nature of the offenses charged against him were such as to make it impossible for a 21-year old defendant with only 6 years of formal education and limited previous criminal experience to handle the case without benefit of counsel.

Statement of the Case

Petitioner Stephen Herman filed a petition for a writ of habeas corpus in the Court of Common Pleas of Washington County, Pennsylvania, alleging that pleas of guilty pursuant to which he was being held in a penitentiary were obtained pursuant to threats and that he had been denied his right to counsel, in violation of due process of law. (Tr. 1-5) Though an answer was filed by the District Attorney, representing the Respondent (Tr. 5-8), the case was disposed of without a hearing. Under Pennsylvania law, no hearing having been held, the averments of the petitioner must be accepted as true except to the extent that they are contradicted by the record (Tr. 23). The following statement of facts, therefore, is taken from statements made in the petition and supporting documents.

Stephen Herman was arrested by the state police in September 1945 (Tr. 18-19), and held for questioning over a period of 72 hours, a portion of which time he spent in the women's quarters of the county jail. He was held incommunicado during this three day period, subjected to intermittent questioning about a series of burglaries and robberies. He was physically assaulted by police officers. Not only his safety, but that of his wife and children were threatened. At one point in the interrogation, a police officer grabbed him by the throat and threatened to choke him if he did not confess. As a result of incommunicado detention and the threats and abuse, defendant finally "con-

fessed" to a series of offenses, signing a form entitled Waiver of Grand Jury and Entry of Plea by which he agreed to plead guilty to three indictment charges of burglary, forgery and larceny of an automobile. (Tr. 4). The same day he was taken before a justice of the peace where he was held for court for 27 separate offenses (Tr. 19).[2]

Prior to the trial, while defendant was held in the Washington County Jail (September 8, 1945 to October 26, 1945) no relative or friend appeared to give him advice, support or assistance (Tr. 2). Since the indictment at No. 59 November Sessions 1945 represented forgery charges made against him by his wife (Tr. 13), it is apparent that his family had turned against him. Brought before the court for sentence on October 26, 1945, petitioner was directed by the Assistant District Attorney to sign pleas to 8 indictments; when he inquired as to what he was signing, he was told by the District Attorney, "Sign your name and forget it." (Tr. 4).

There were 27 different charges in the indictments against petitioner, carrying a maximum of 315 years (Tr. 2-3). Petitioner at the time of the entry of his guilty plea was 21 years of age. His only education was 6 years of elementary school. His only previous criminal experience was in 1943 when he had pleaded guilty—without benefit of counsel—to charges of burglary, larceny and forgery and had been sentenced to 6-12 months in the county

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[2] Even now there is confusion in the record as to how many charges there were against petitioner. He alleged that there were 27 charges against him (Tr. 2); the sentences he recites are for 21 offenses (Tr. 1-2); the District Attorney's answer admits both allegations (Tr. 6); the trial minutes show there were 21 offenses charged (Tr. 10-13); the courts of Pennsylvania state that there were 30 offenses charged (Tr. 18, 24). Though less advantageous to our case than the figure of 30, we shall stipulate for purposes of the proceedings in this Court that there were 27 offenses, the theory on which the petition for certiorari was drafted, at which time these discrepancies had not been noted.

jail (Tr. 2). Petitioner was unfamiliar with formal courtroom procedure, did not know that he had a right to be represented by court-appointed counsel, was never so advised by the court, the prosecuting attorney or any other court officials, nor was he asked to waive nor did he waive appointment of counsel. (Tr. 2). Nor was petitioner informed by anyone that by signing the pleas he was pleading guilty to indictments that carry a maximum sentence of 315 years. (Tr. 3). He did not even learn until January 1946, when he wrote to the trial judge inquiring as to the offenses for which he had been sentenced, specifically what offenses he had pleaded guilty to (Tr. 4).

The Pennsylvania courts have denied habeas corpus.

Summary of Argument

1. The procurement of a plea of guilty through protracted questioning for three days during which defendant was held incommunicado and he and his family threatened, together with physical abuse, requires that the conviction be invalidated. Not only does a coerced confession have a continuing effect, but surely the coercion of a plea of guilty at the time of entry of plea and sentence invalidates conviction based thereon. Moreover, the action of the District Attorney in refusing an uncounselled defendant information as to what he is signing when he is in effect making a guilty plea, amounts to a procurement of a plea of guilty by trickery in violation of due process of law.

2. To have each right-to-counsel case decided upon its own facts puts an extreme burden upon this Court. While it is appreciated that no rule of thumb can be made, we urge that even in non-capital cases counsel must be appointed where a person faces a life sentence without possibility of parole. Such a rule, in addition to being just and in accordance with a strict interpretation of due process of law, will help to ease the administration of justice.

3. Under the facts of the case, the failure to advise petitioner that he had a right to have counsel represent him at the expense of the state amounts to a violation of due process of law, considering the defendant's youth, lack of education, the threats of the prosecution, and the failure of the court to perform the functions ordinarily entrusted to counsel by advising defendant of the consequences of his guilty plea.

4. All members of this Court who have previously spoken on right to counsel questions are not in agreement as to what the right to counsel entails. Some Justices believe that in every state trial involving a serious offense, counsel must be appointed; others believe that in non-capital state cases, each case must depend upon its own facts. Whichever of these tests is applied here, prior precedent clearly requires that the conviction here be upset.

5. Petitioner's conviction must be vacated under any of the four theories of the case set forth above, certainly on the basis of all together.

Argument

I. SINCE DEFENDANT'S CONFESSION WAS PROCURED BY ILLEGAL DETENTION, PROTRACTED QUESTIONING OVER A PERIOD OF 72 HOURS, THREATS TO HIMSELF AND FAMILY, AND PHYSICAL ABUSE, HIS CONVICTION MUST BE UPSET.

Under the decisions of this Court in *Watts* v. *Indiana*, 338 U.S. 49 (1949), *Turner* v. *Pennsylvania*, 338 U.S. 62 (1949), and *Harris* v. *South Carolina*, 338 U.S. 68 (1949), there is no doubt but that illegal detention, coercive questioning and physical abuse and mistreatment invalidates a confession secured thereby. Allegations in a Petition for Habeas Corpus that these factors are present here require that a hearing be held to determine the facts, as in any case where a deprivation of constitutional rights is

properly averred in the petition and the record itself fails to rebut the averments. *Palmer v. Ashe*, 342 U.S. 134 (1951).

In the case at bar, a rule to show cause why the writ should not be issued was granted, and an answer filed. Factual issues were raised by the answer, and accordingly, a hearing was required by the decisions of this Court. Nonetheless, the Superior and Supreme Courts of Pennsylvania refused the relief sought.

In its opinion, the Superior Court referred to Petitioner's contentions re illegal detention, extensive questioning, threats and physical abuse (Tr. 25), but expressed no opinion as to whether these facts, if true, amounted to a denial of due process or required a hearing. No attempt was made to reconcile this evasion of the constitutional problem with the previous holdings of this Court.

It might be contended that an agreement to plead guilty based upon the 72 hour illegal period of detention and events occurring during such time would not necessarily carry over into petitioner's plea of guilty some days later. Had the effect of coercion carried over to the time of plea, it surely would have rendered the plea invalid. Cf. *Leyra* v. *Denno*, 347 U.S. 556 (1954). Whether it so carried over, or whether the guilty plea was voluntary, was a question of fact which could be determined only after hearing. But a hearing was denied. Only a hearing could establish whether Herman, at plea time, felt that he was bound by his previous confession and the paper he signed agreeing to enter a guilty plea. But in any event, the action of the Assistant District Attorney at the time of entry of plea in telling the defendant to sign his name to the paper and forget it, even standing by itself, would be enough to vitiate the conviction. *Smith* v. *O'Grady*, 312 U.S. 329 (1941) [state case]; *Walker* v. *Johnston*, 312

U.S. 275 (1941) [federal prosecution, but citing a state case—*Mooney* v. *Holohan*, 294 U.S. 103 (1935)—in support]; cf. *Von Moltke* v. *Gillies*, 332 U.S. 708, 710 (1948) (federal prosecution).

The propositions advanced under this portion of the argument seem so elementary to us that they deserve no extended analysis in this brief. What is surprising is the failure of the appellate courts of Pennsylvania to pass upon the question of whether illegal detention, extensive questioning, threats and physical abuse constitute a deprivation of due process of law. This is understandable solely in the light of the evasions of the holding of the *Watts*, *Turner* and *Harris* cases, cited *supra*, p. 6, which has characterized recent Pennsylvania decisions, the Intermediate Appellate Court of which has held it is bound by its own state court decisions in matters involving the United States Constitution rather than the decisions of the United States Supreme Court. *Commonwealth* v. *Friday*, 171 Pa. Super. 397, 404, 90 A. 2d 856, 859 (1952).[3]

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[3] "Whatever be the impact of the opinions of the United States Supreme Court, this court is bound by the decisions of the Supreme Court of Pennsylvania which has provided the controlling authority in a recent case, *Commonwealth* vs. *Shupp*, 365 Pa. 439, 446, 448, 75 A. 2d 587, 590." Based upon its interpretation of the effect to be given to the *Shupp* case, the Superior Court rejected defendant's contention in the *Friday* case, on an appeal from a conviction for Attempted Rape, that the confession used against him was obtained in violation of his constitutional rights as defined in the *Watts* and *Turner* cases.

In the *Shupp* case, the defendant had been held for 15 *days* without a preliminary hearing, during which period he was frequently questioned by the authorities, and was refused counsel. The Pennsylvania Supreme Court held that the delay in holding the hearing was immaterial, that long interrogation is not *per se* unfair, and that interrogation may lawfully be continued until the defendant confesses, unless mental coercion or duress is shown. In so holding the Court relied heavily upon *Commonwealth* v. *Agoston*, 364 Pa. 464, 72 A. 2d 575 (1950), cert. den. 340 U.S. 844, wherein Chief Justice Maxey upheld the use of a confession secured after intermittent questioning during a four day period, during which time defendant was not given a preliminary hearing, and had no counsel. In pointing out the reasons why police officers should be per-

While we realize the delicate nature of state-federal relationships, apparently the courts of Pennsylvania have failed to follow a simple and clear statement of the law laid down by this Court in reference to matters involving coercion of confessions and guilty pleas.

II. (A) FAILURE TO ADVISE A DEFENDANT OF HIS RIGHT TO COURT-APPOINTED COUNSEL, IN A CASE IN WHICH HE FACES A POSSIBILITY OF A LIFE SENTENCE WITHOUT PAROLE, VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

(B) IN ANY EVENT, THE JUDGMENT BELOW MUST BE REVERSED SINCE PETITIONER WAS DEPRIVED OF DUE PROCESS OF LAW IN THAT (1) HE WAS REFUSED INFORMATION AS TO THE INDICTMENTS AGAINST HIM; (2) HE WAS NOT ADVISED, NOR DID HE HAVE KNOWLEDGE OF, HIS RIGHT TO HAVE COURT-APPOINTED COUNSEL; AND (3) THE NUMBER AND THE NATURE OF THE OFFENSES CHARGED AGAINST HIM WERE SUCH AS TO MAKE IT IMPOSSIBLE FOR A 21-YEAR OLD DEFENDANT WITH ONLY SIX YEARS OF FORMAL EDUCATION AND LIMITED PREVIOUS CRIMINAL EXPERIENCE TO HANDLE HIS CASE WITHOUT BENEFIT OF COUNSEL.

A. The history of the development of the right to counsel in state cases is set forth at length in Edward S. Corwin's "The Constitution of the United States of America", prepared by the Legislative Reference Service of the Library of Congress (1953) on pages 1098-1109. It need not be

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mitted to continue interrogation until a confession is obtained, the Court quoted with approval from the *dissenting* opinion in *Turner*.

In Commonwealth v. *Johnson*, 365 Pa. 203, 74 A. 2d 144 (1950), the Pennsylvania Supreme Court, in the case of Turner's co-defendant, sustained the use of the very confession invalidated by this Court, as well as the use of Johnson's own confession, procured under similar circumstances and at the same time. This Court, relying on reversed *Turner*, Per Curiam, *Johnson* v. *Commonwealth*, 340 U.S. 881 (1950).

Thereafter, in two cases in which certiorari was denied by this Court, the Pennsylvania Superior Court, in refusing relief, relied upon Mr. Justice Jackson's dissenting opinion in *Turner*: *Com. ex rel. Master* v. *Baldi*, 166 Pa. Super. 413, 72 A. 2d 150 (1950), cert. denied, 340 U.S. 866; *Com. ex rel. Baerchus* v. *Burke*, 172 Pa. Super. 400, 94 A. 2d 87 (1953); *cert. denied*, 345 U.S. 966.

repeated here. But we do think that clarity in the understanding of the limits of the constitutional right to counsel can be promoted by classification of state cases into three categories: (1) cases involving the right to be *advised* of one's right to counsel; (2) cases involving affirmative *interference* by the state with the right to counsel; (3) cases involving the right to the *appointment* of counsel. Unfortunately, these three separate aspects of the matter have all too frequently not been kept separate. But cf. *Chandler v. Fretag*, 348 U.S. 3 (1954), at 9. This case involves the first and third aspects of the right to counsel. It involves both the failure of the trial court to advise petitioner of his right to counsel and the question of to what extent that right existed, that is, whether it included the right to have counsel appointed.

It had been thought until *Bute* v. *Illinois*, 333 U.S. 640 (1947) that the Fourteenth Amendment due process clause required that all defendants in all state criminal prosecutions be advised that they had a right to counsel. 46 *Columbia Law Review* 647, 648 (1946). So, at any rate, was the actual holding of this Court in *Rice* v. *Olson*, 324 U.S. 786 (1945), for the pleadings there raised only the question of failure to advise a defendant in a state criminal case of his right to counsel. While the language used by the Court in its opinion goes beyond this narrow problem, the holding could only have been as broad as the issue presented. Hence this Court must have held that advice as to the existence of the right to counsel was an essential element of due process. But in the *Bute* case, this Court cast doubt on the matter by holding that in the face of the record as presented, the failure to advise of the right to counsel, or to inquire into petitioner's desire for counsel, did not violate due process. In that case, however, the trial court had explained to the defendant the consequences of his guilty plea. The only reason upon which this Court

based its sanctioning of the procedure below was that in the circumstances of that case, there was no constitutional right to counsel. Obviously where there is no constitutional right to assistance of counsel, there is no duty to advise the defendant of its existence. Nor did the record show in that case that petitioner was ignorant of his right to counsel. Hence, the rule to be deduced would seem to be that a trial court must advise defendant in a state criminal case of his right to counsel such as it is, in a case in which a defendant is unaware that he has a right to counsel.

Anything other than such an analysis of the *Bute* and *Rice* decisions would result in an anomaly: that a defendant ignorant of the existence of the right to counsel could be sentenced for a crime upon a guilty plea whose consequences have never been explained to him by either counsel or the court. Where consequences are explained, inevitably failure to request counsel when petitioner knew of his right to counsel must be construed as a waiver of such right. *Carter* v. *Illinois*, 329 U.S. 173 (1946). Where petitioner does not know of his right to counsel, it could hardly be contended that he intelligently waived his right to counsel despite the explanation by the court of the consequences of the guilty plea. *Gibbs* v. *Burke*, 337 U.S. 773, 780 (1949). For a defendant might not realize that he would have a right to counsel were he to plead innocent, and even an explanation of the consequences of a guilty plea could not properly take the place of the careful advice by an attorney of the consequences when weighed against the possible advantage of a plea of innocent. *Von Moltke* v. *Gillies*, 332 U.S. 708, 721 (1948).

The question therefore arises as the extent of the right to counsel in the case at bar. We second the comments of Corwin that this Court's consideration of each non-capital right to counsel case on a case by case basis is not "very

reassuring." *Op. Cit., supra* at page 1108. Of course, as a practical matter, this Court cannot lay down any mathematical formula to cover the multitude of possible violations of the right which may arise from case to case with myriads of variables. But we urge that this Court adopt a rule which will cover a substantial number of cases in which confusion still reigns. Our suggested formula is just this: that non-capital cases in which the possible punishment is life imprisonment without possibility of parole should be treated precisely as are capital cases; that in such cases the right to counsel is absolute;[4] that the degree of prejudice need not be assessed, nor the circumstances of the individual case. For in either case the possibility that the defendant faces is that the state will take his life. In a capital case, his life is to be taken in one fell swoop; in a life imprisonment case, his life is forfeited to the state too. There seems to us to be no reason for a difference in rule simply because a man forfeits his life on a day to day basis—on the installment plan as it were—instead of in one moment of high tragedy. It is common knowledge that most of those convicts who have had death sentences commuted to life imprisonment feel that they would have been better off had they been executed. Surely, life imprisonment is not worth living. To condemn a man to a living death in prison for the rest of his life is equally as serious as to execute a man. Cf. *Williams* v. *New York*, 337 U.S. 241 (1949).

Indeed, we suggest that were a statute passed requiring an absolute right to counsel in capital cases, but a flexible standard in non-capital cases where life may be forfeit too, such a statute would present a close question of whether it violated the equal protection of the laws. It

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[4] *Tomkins* v. *Missouri*, 323 U.S. 485 (1945); *Williams* v. *Kaiser*, 323 U.S. 471 (1945); *Hawk* v. *Olson*, 326 U.S. 271 (1945); see *Uveges* v. *Pennsylvania*, 335 U.S. 437, 440-1 (1948).

could well be argued that a discrimination based solely upon quick execution as against a living death was arbitrary and unreasonable. In formulating a constitutional rule of due process, it would seem best to avoid raising constitutional difficulties involving other constitutional provisions. Cf. *Rumely* v. *United States*, 345 U.S. 41 (1953).

We can draw little comfort for the proposition above, however, from the past decisions of this Court. Indeed, in *Quicksall* v. *Michigan*, 339 U.S. 660 (1950), this Court found that there was no absolute right to have counsel appointed in a non-capital case involving life imprisonment. But the contention made above was not suggested to this Court in the arguments of counsel, nor passed upon by this Court. *Semble*, *Massey* v. *Moore*, 348 U.S. 105 (1954). Nor does it appear in either case that the possibility of parole was absent, as it was here. However, we do point out that the four dissenters in the *Bute* case felt that *any* criminal case involving a serious charge requires the same protection of the right to counsel as is found in capital cases. Said the dissenters:

> "Certainly due process shows no less solicitude for liberty than for life. A man facing a prison term may, indeed, have as much at stake as life itself.
>
> * * * But to draw the line between this case and cases where the maximum penalty is death is to make a distinction which makes no sense in terms of the absence or presence of *need* for counsel. Yet it is the *need* for counsel that establishes the real standard for determining whether the lack of counsel rendered the trial unfair. And the need for counsel, even by *Betts* v. *Brady* standards, is not determined by the complexities of the individual case or the ability of the particular person who stands as an accused before the court. That need is measured by the *nature* of the

> *charge* and the *ability* of the *average* man to face it alone, unaided by an expert in the law. As *Powell* v. *Alabama*, 287 U.S. 45, . . . indicates, the need for counsel in capital cases is great even though the defendant is an intelligent and educated layman. The need is equally as great when one stands accused of the serious charge confronting Bute." 333 U.S. at 681, 682. (Italics the Court's).

In the *Bute* case, the maximum penalty was 20 years. It was not a life sentence. Yet four members of this Court felt that even then there must be an absolute right to counsel. We urge that as a minimum, the same protection of the absolute right to counsel must extend to cases which are capital in the sense that life is forfeited to the state by life imprisonment. There is no reason in law or justice why the same protection should not extend. A trial procedurally unfair as to one facing death is not fair as to one facing life imprisonment.

We must admit, however, that this Court need not go so far as suggested above, in order to decide this case favorably to petitioner, for it is clear even under the narrow tests discussed below that the right to counsel has been denied under the facts of this case. We do urge, however, that the above proposition is one rule of thumb which should be laid down not only to ease the task of courts and attorneys and to bring more clarity into the law, but in order to do full justice, to insure that due process is preserved. There is no reason to discriminate against those facing life imprisonment in order to give them less procedural due process than is afforded the man who faces execution. What's fair is fair!

B. It is clear, in any event, that this petitioner was denied his right to counsel under the decision of this Court in *Ureges* v. *Pennsylvania*, 335 U.S. 437 (1948). In the *Ureges* case, this Court held that the right of counsel had

been denied in a case on all fours with the case at bar—the only difference being that ours is a stronger case. The Court there reviewed a denial by the Supreme Court of Pennsylvania of a petition to appeal from a judgment of the Superior Court which affirmed dismissal of a petition for habeas corpus. We quote below—in its entirety—this Court's summary of the allegations of the petition for habeas corpus, and quote in a parellel column the allegations in the case at bar.

Uveges	Herman
1. "On October 27, 1954, petitioner Uveges, a youth seventeen years of age, was faced with four district attorney's indictments charging four separate burglaries." (*Id.* at 438-9)	1. "At the time of sentence, Relator was 21 years of age and of limited educational background, having completed only six years of elementary school. [Note: not denied. (Tr. 2)] * * * The charges against Relator, though contained in eight indictments, in fact involved 27 separate offenses under which the maximum possible sentences would total 315 years in the penitentiary." (Tr. 2-3). [Note: admitted (Tr. 6)]
2. "Upon his plea of guilty to these indictments, Uveges was sentenced . . . to from five to ten years on each indictment, the sentences to run consecutively." (*Id.* at 439)	2. "The said sentences impose upon Defendant a total imprisonment of a minimum of 17½ years . . . and a maximum of 35 years. . . ." (Tr. 2)
3. " . . . petitioner alleged that he was not informed of his right to counsel nor was	3. "Relator did not know that he had a right to be represented by court-ap-

counsel offered him at any time during the period between arrest and conviction." (*Ibid.*)

pointed counsel and was never so advised by the court, the prosecuting attorney, or any other court official." (Tr. 2) [Note: no contention here that Herman was ever offered counsel.]

4. "He also alleged that frightened by threats of dire consequence if he dared to stand trial, relator pleaded guilty under the direction of an assistant district attorney. . . .' We disregard this last allegation because it was not presented to the Supreme Court of Pennsylvania in the petition for allowance of appeal." (*Ibid.*)

4. "Relator was questioned off and on over this 72-hour period by the State Police and during the questioning the safety of his wife and daughter were threatened. (c) At one stage in the questioning, Relator was assaulted by State Trooper H. M. Jaynes, who grabbed him by the neck and threatened to choke him if he did not confess." (Tr. 4) [Note: these allegations—as well as all the others mentioned here—were presented to the Supreme Court of Pennsylvania in summary form in the petition for allowance of appeal. (Tr. 28-9.)]

5. "The Superior Court of Pennsylvania affirmed. . ., noting that Uveges had been arrested once before for burglary and confined in a reformatory for ten months." (*Ibid.*)

5. "Relator's previous experience in criminal court had been confined to the entering of pleas of guilty in 1943 to charges of Burglary, Larceny and Forgery, for which offenses he received a sentence of 6-12 months in the County Jail." (Tr. 2) [Noted by Superior Court: see Tr. 24-25]

6. Requirement of counsel might have been dispensed with had court "conscientiously . . . undertaken to perform the functions ordinarily entrusted to counsel." (*Id.* at 442)	6. No protection of defendant's rights at all; summary sentence. (Tr. 10-18)
7. Maximum possible sentence: 80 years. (*Id.* at 442)	7. Maximum possible sentence: 315 years (Tr. 2-3).

This Court concluded that on the basis of the facts in Uveges, due process of law had been violated by failure to appoint counsel for defendant. Said Mr. Justice Reed, speaking for the Court:

> "Some members of the Court think that where serious offenses are charged, failure of a court to offer counsel in state criminal trials deprives an accused of rights under the Fourteenth Amendment. They are convinced that the services of counsel to protect the accused are guaranteed by the Constitution in every such instance. * * * Only when the accused refuses counsel with an understanding of his rights can the court dispense with counsel. Others of us think that when a crime subject to capital punishment is not involved, each case depends on its own facts. * * * Where the gravity of the crime and other factors—such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair; the latter group hold that the accused must have legal assistance under the Amendment whether he pleads guilty or elects to stand trial, whether he requests counsel or not. Only

a waiver of counsel, understandingly made, justifies trial without counsel.

"The philosophy behind both of these views is that the due process clause of the Fourteenth Amendment or the Fifth Amendment requires counsel for all persons charged with serious crimes, when necessary for their adequate defense, in order that such persons may be advised how to conduct their trials. The application of the rule varies as indicated in the preceding paragraph.

"Under either view of the requirements of due process, the facts in this case required the presence of counsel at petitioner's trial. He should not have been permitted to plead guilty without an offer of the advice of counsel in his situation. If the circumstances alleged in his petition are true, the accused was entitled to an adviser to help him handle his problems. Petitioner was young and inexperienced in the intricacies of criminal procedure when he pleaded guilty to crimes which carried a maximum sentence of eighty years. There is an undenied allegation that he was never advised of his right to counsel. The record shows no attempt on the part of the court to make him understand the consequences of his plea. Whatever our decision might have been if the trial court had informed him of his rights and conscientiously had undertaken to perform the functions ordinarily entrusted to counsel, we conclude that the opportunity to have counsel in this case was a necessary element of a fair hearing." 325 U.S. at 440-442 (footnotes omitted).

We note in passing that the three dissenting Justices in *Uveges* dissented not on the merits but on the procedural ground that the issue had not been properly presented to

the Pennsylvania courts. There is no question in the case at bar as to proper raising of the issues.

We need not belabor the obvious by reiterating the point that the facts in *Uveges* and in the present case are virtually identical. Under either of the two theories set forth by Mr. Justice Reed, clearly Petitioner here was deprived of due process of law by failure to advise him of his right to have court-appointed counsel. Accord, *Palmer* v. *Ashe*, 342 U.S. 134 (1951).

The Common Pleas Court and the Superior Court both referred to the fact that defendant had previous criminal experience (Tr. 20, 24). But this was considered immaterial by this Court in *Uveges* (see supra p. 16). Here, moreover, it is alleged that "Relator had no knowledge of formal criminal proceedings . . ." (Tr. 2).

In *Walker* v. *Johnston*, 312 U.S. 275 (1941), petitioner claimed that he hadn't known of his right to counsel, though he was an escaped convict from the state penitentiary. While the government denied that he had lacked such knowledge, this Court held that "The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record he has the right to be heard." *Id.* at 287. Lest it be thought that the rule of *Walker* was due to its being a federal case, we point out that the rule has been applied just as strictly, if not more so, in state cases. In *Gibbs* v. *Burke*, 337 U.S. 773, a state case, the petitioner had a record of eight convictions and nine acquittals, discharges, and no true bills. *Id.* at 775. Yet the petitioner alleged that he had not known of his right to counsel, and this Court held that his failure to request counsel when he did not know of his right thereto was not a waiver. *Id.* at 780. In the case at bar, it is peculiarly difficult to understand how the defendant could have known that he had the right to have counsel appointed when the

courts of Pennsylvania have held that he had no such right. Is petitioner to be charged with more knowledge of the law than the Justices of the Pennsylvania appellate courts? Only a hearing could determine defendant's knowledge of his rights.

As this Court said in *Wade* v. *Mayo*, 334 U.S. 672 (1947):

> "It appears that petitioner, at the time of his trial . . . was 18 years old, and though not wholly a stranger to the Court Room, having beeen convicted of prior offenses, was still an inexperienced youth unfamiliar with court procedure, and not capable of adequately representing himself . . ."
>
> "There are some individuals who, by reason of age, ignorance or mental capacity, are incapable of representing themselves adequately in a prosecution of a relatively simple nature. This incapacity is purely personal and can be determined only by an examination and observation of the individual. Where such incapacity is present, the refusal to appoint counsel is a denial of due process under the Fourteenth Amendment."

The record herein amply demonstrates Herman's inability to handle his case without counsel. Twenty-seven charges were brought against him, many of them being offenses of a technical nature. For example, in No. 59 November Sessions, 1945, the defendant was charged with the commission of seven forgeries. All of the cases involved the signing of his wife's name to checks written on her account and honored by the bank. (Tr. 13). No third person was defrauded. The Commonwealth offered in evidence checks supporting six of the seven cases, but on the third count, charging forgery of a $15.00 check on June 3, 1945, the check was not produced, or at any rate

does not appear in the record in criminal court. It being apparent from the Commonwealth's evidence that no person other than defendant's wife was defrauded, it is clear that, on trial, no case could have been made out, since her testimony would probably not have been admissible under the provisions of the Pennsylvania Act of May 23, 1887, P. L. 158, as amended (19 P.S. 683), which bars a wife from testifying against her husband. It is also clear that the seven forgery charges involved substantial questions as to whether Herman had authority to sign his wife's name as her agent, whether the bank account was her sole and separate property, etc. No layman, and particularly not a 21 year old defendant with a sixth grade education, could be expected to see that such legal questions and defenses were involved, much less to pass intelligently on these technical questions. Yet Herman's uninformed plea was accepted and sentences of 2½ to 5 years were imposed on each count, to run concurrently with each other, but consecutively with the sentences on other indictments.

A further indication of the complexity of the legal issues involved is presented by the indictment in No. 58 November Session, 1945 (Tr. 12-13). In the First Count of this indictment, defendant was charged with having forged the name of the payee to a check in the amount of $28.28. (Tr. 12). The Plea Notes show the following in reference to the Second Count of the same indictment:

F. J. Doktor, Assistant District Attorney:

> "The second count charges this Defendant with false pretense, involving the same set of circumstances. He tried to defraud one Wilner, with whom he attempted to cash the check." (Tr. 13)

On this evidence, the offense of False Pretense was not made out, although Defendant might have been guilty of

an attempt to commit the offense. Yet on evidence which at most sustains the commission of an attempt, a misdemeanor, Defendant was sentenced to the Penitentiary for 2½-5 years.

It should be noted that the eight indictments, containing 27 counts, on their face indicated the presence in the case of technical questions which an uneducated layman could not be expected to cope with adequately. As this Court put it:

> "The guiding hand of counsel is needed lest the unwary concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the state exacts for the offense which they in fact and in law committed." *Tomkins* v. *Missouri*, 323 U.S. 485, 489 (1945).

In addition, also before the Court was defendant's agreement to plead to *three* offenses. Yet nowhere in the record does it appear that the Court concerned itself in any way with this multiplication of charges. Nor in his Answer does the District Attorney allege that the indictments were explained to the defendant. As this Court stated in *Smith* v. *O'Grady*, 312 U.S. 329, 334 (1941) notice of the true nature of the charge is ". . . the first and most universally recognized requirement of due process . . ."

In the *Uveges* case, cited supra, Mr. Justice Reed referred to the fact that the requirement of counsel might have been dispensed with in that case if the court had informed the defendant of his rights and ". . . conscientiously had undertaken to perform the functions ordinarily entrusted to counsel . . ." (at p. 442). Accord: *Gibbs* v. *Burke*, supra; *Carter* v. *Illinois*, supra. This duty was completely disregarded by the trial court in this case. The Court well knew that this defendant was only 21 years of age (Tr. 13). The Judge knew also that this defendant

had previously entered a guilty plea. (*Ibid.*) He was aware of the seriousness of the offenses charged against the defendant, and that technical questions were necessarily involved. He knew, or should have known, that defendant was of limited educational background, and had agreed, following arrest, to plead to three charges, yet was now before him 27 counts. All of these factors should have indicated to the Judge that Herman needed counsel, or, at the minimum, the conscientious and careful scrutiny of the case which was required to prevent this defendant from being overreached. Yet, notwithstanding these facts, the court proceeded to sentence this defendant, without counsel, without informing him of his rights, without even telling him of the potential enormous sentence he was facing and with no effort to assure himself that each of the 27 charges was properly brought.

One additional factor present in this case clearly indicates the prejudice to this defendant of his entry of plea without counsel. Defendant's pleas resulted from the fact that he had previously confessed to certain of the charges. Had he been advised by counsel, he would have known that the previous confession could have been repudiated and the question of whether or not it was voluntarily made submitted to the jury. Ignorant of this fact, the defendant by signing the pleas ratified what he felt he had done irrevocably at an earlier date.

This record, then, indicates that Defendant's guilty plea, made without counsel, resulted in the denial of his rights to due process of law. The ruling of the Pennsylvania courts to the contrary is not binding upon this Court, which may determine for itself whether a federal right had been denied from an inspection of the record. *Powell* v. *Alabama*, 287 U.S. 45 (1932).

Viewing this case as a whole, with regard to substance as well as form, it is clear that Petitioner stated a cause

of action. If Petitioner's averments are true, as must be assumed in this proceeding, there is no doubt that he was deprived of his federal constitutional rights.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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